

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SYSTEM TWT TRANSPORTATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 87-212

ORDER GRANTING APPELLANT'S
MOTION FOR SUMMARY JUDGMENT

This case involves the appeal of a hazardous waste generator fee in the amount of \$3,000 assessed by the Department of Ecology (DOE) to System TWT Transportation. On September 8, 1987, System TWT appealed the assessment and it became PCHB No. 87-212.

On January 22, 1988, respondent DOE filed a Motion for Summary Judgment against System TWT Transportation, with an accompanying declaration, a memorandum and supporting material.

On February 29, 1988, System TWT Transportation filed its Motion for Summary Judgment against DOE, with accompanying affidavits and a memorandum.

On March 14, 1988, respondent DOE filed a responding Memorandum.

The motions came on for argument before the Board, Lawrence J. Faulk (Presiding) Wick Dufford, and Judith A. Bendor, on March 21, 1988. Terese Neu Richmond, Assistant Attorney General, represented respondent DOE. Lynda L. Brothers, Attorney at Law, represented appellant System TWT Transportation.

The Board has considered the arguments of counsel and the following materials from the record:

- 1) TWT letter appealing assessment, filed September 8, 1987
- 2) TWT letter amending appeal, filed December 14, 1987
- 3) Respondent's Motion for Summary Judgment, filed January 22, 1988
- 4) Memorandum in Support of Respondent's Motion for Summary Judgment
- 5) Declaration of Karen Michelena with Attachments (1) and (2)
- 6) Appellant's Motion for Summary Judgment, filed February 29, 1988
- 7) Memorandum in Opposition to WDOE Motion and In Support Appellant's Motion
- 8) Affidavit of Ted Rehwald
- 9) Second Affidavit of Ted Rehwald
- 10) Memorandum in Response to Appellant's Motion & In Response to Appellant's Memorandum in Opposition to Ecology's Motion

After considering the arguments, the submissions, and the files and records herein, the Board concludes as follows:

1. Respondent DOE was not prejudiced by appellant's raising new issues in its Motion for Summary Judgment and, indeed, responded thereto fully in advance of the hearing.

2. It is undisputed that the fee appealed herein is calculated in part on adjusted gross income attributable to business activities conducted outside the state. Therefore, as a matter of law, the fee is based upon an incorrect adjusted gross income, and therefore is in error. RCW 75.105A, WAC 173-305-030(2)(a). Cam Industries, Inc. v. DOE, PCHB No. 86-32 (1986).

We therefore GRANT Summary Judgment to appellant, and REMAND the matter to the Department to have the fee properly calculated in conformance with this Order.

In so doing, and to provide guidance for the future, we find appellant's other legal contentions under RCW 70.105A.030(1) [i.e. that 1) DOE failed to determine appellant TWT's major business purpose, and that 2) Appellant's business activities are exempt] to be without merit. We do not reach the issue of the applicability of the once a year generator fee reduction under WAC 173-305-040(b).

ORDER

NOW THEREFORE, respondent's Motion for Summary Judgment is denied and appellant's is GRANTED and the matter REMANDED to the Department for action in accordance with this Order.

SO ORDERED this 3d day of May, 1988.

POLLUTION CONTROL HEARINGS BOARD

 5/3/88
LAWRENCE J. FAULK, Presiding


WICK DUFFORD, Chairman


JUDITH A. BENDOR, Member